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739789—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1167

ERIC ADOLFSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 138–152) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 6, 1947 (R. 153), and a petition for rehearing was denied March 4, 1947 (R. 154). The petition for a writ of certiorari was filed March 27, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and

45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether it was error for the trial court to instruct the jury that if they found that petitioner sought to purchase certain property at a price disproportionate to its value, that fact might be considered as a circumstance from which the jury might infer that petitioner knew the property was stolen.

2. Whether Section 36 of the Criminal Code, relating to the theft, etc., of property "furnished or to be used for the military or naval service," applies with respect to watches and pens purchased by the Navy Department for use by or resale to its military personnel overseas.

3. Whether the evidence adduced to establish petitioner's guilty knowledge is sufficient to sustain the verdict.

STATUTE INVOLVED

Section 36 of the Criminal Code (18 U. S. C. 87) provides:

> Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in sections 80 and 82–86 of this title.

STATEMENT

On June 27, 1945, an indictment in one count was filed in the District Court for the Northern District of California, charging that petitioner and one Ben Amdursky violated Section 36 of the Criminal Code in that on or about May 18, 1945, they (R. 2)

> * * * [applied] to their own use property of the United States of America furnished and to be used for the armed services, to-wit: 24 Elgin wrist watches, 100 Parker 51 fountain pens, and 56 Shaeffer fountain pens, of a market value in excess of the sum of $50.00, said defendants then and there well knowing the said property was the property of the United States of America furnished and to be used for the armed services.

After a trial by jury, petitioner was found guilty (R. 8, 128) and sentenced to imprisonment for three years (R. 12–13).[1] On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of conviction was affirmed (R. 153).

The evidence in support of the conviction may be summarized as follows:

From March to May 1945, the Navy Department maintained a shipping and storage plant known as the Encinal Terminal in Alameda County, California (R. 45). During that time, certain shipments of fountain pens (R. 41–43,

[1] Amdursky was acquitted on direction of the trial court (R. 8, 119, 128).

46–47) and wrist watches (R. 38–40, 46–47) were received at the terminal for reshipment overseas. Included were 200 Shaeffer and 100 Parker fountain pens (R. 42–43), which cost the Government $6.25 and $7.50 per pen, respectively (R. 44). The boxes in which the pens were contained were stamped with a Navy inspector's mark, an anchor with the letters "U. S.," which is stamped only on material that goes to the Navy (R. 43–44). The shipment of watches included Elgin watches (R. 38–39) which were specially manufactured for the Marine Corps at $13.43 per watch (R. 31–36). A comparable watch would retail for about $47.50 (R. 36). The testimony showed that watches of the kind here involved are sometimes issued to Marine Corps personnel overseas "where they have a job that requires a watch" (R. 41) and that "the only ones sold are sold to officers proceeding overseas" (R. 40). The pens were intended for resale to marine or naval personnel only at overseas ships stores (R. 42, 44, 47–48).

During April and May 1945, Glenn Howard Scott, a marine private who was assigned to guard duty at the Encinal Terminal warehouse in which the above articles were stored, stole boxes containing 24 of the Elgin watches, 100 Parker pens and about 58 Shaeffer pens (R. 52–55). Jesse Seelye, a civilian mechanic employed at the terminal, helped Scott remove the stolen items from the terminal (R. 53, 55, 70).

On or about May 17, 1945, Scott, wearing the regular uniform of a marine private, and Seelye took the loot in a satchel to petitioner's cigar store in San Francisco (R. 55–58, 71–75). Scott had previously sold petitioner a quantity of cigarette lighters he had also stolen from the Encinal Terminal (R. 53, 59, 106). As a result of Scott's negotiations with petitioner on the 17th of May, petitioner gave him a little over $1,000 in cash for the 24 watches and 158 pens (R. 55, 58). Part of the loot was recovered by F. B. I. agents from persons to whom it had been resold (R. 27–31, 83–88, 93–94); these articles were identified at the trial (R. 27–28) and shown to have been part of the shipments sold to the Marine Corps (R. 32–36) and stolen while stored at the Encinal Terminal (R. 38–40).

The Government also introduced (R. 103–105) a written statement petitioner had made to agents of the F. B. I. prior to his trial (R. 105–109) in which he admitted that on May 17 or 18, 1945, he had purchased the watches and pens from Scott, who was in uniform; that he paid $220 for one group of 18 Shaeffer and Parker 51 pens, $754 for a second group of 40 Shaeffer and 88 Parker 51 pens, and $150 for 24 Elgin watches; and that (R. 107–108)—

> Although this marine told me that none of the lighters, pens or watches had been stolen, I know that they couldn't be bought or at least were very hard to buy on the

> civilian market because the army and navy were taking all of them. The marine had no papers to prove his ownership. I thought there was a good possibility that these items had been stolen. It sounded odd to me that a marine had possession of all these items.

ARGUMENT

1. Petitioner contends (Pet. 27–34) that the trial court committed reversible error in instructing the jury (R. 121)—

> that if you find that the defendant Eric Adolfson sought to purchase or to sell the watches or the fountain pens at a price disproportionate to the value of said watches or fountain pens, this fact may be considered by you as a circumstance from which you may infer that said defendant knew the watches and fountain pens were stolen.

Petitioner argues that "an inference of guilty knowledge cannot be drawn merely from evidence that the purchase or sale of stolen property was at a price disproportionate to its value" (Pet. 28). However, to paraphrase the language of this Court in *Tot* v. *United States,* 319 U. S. 463, 467–468, such an inference is permissible "if there be [a] rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is [not] arbitrary because of lack of connection be-

tween the two in common experience." We submit that under the circumstances of this case and in the light of common experience as of the date of the offense in question, the inference which the challenged instruction permitted the jury to draw accords with the foregoing standard. The evidence showed that petitioner purchased the pens and watches from a marine in uniform, that he paid about $1,000 (see p. 5, *supra*) for merchandise which cost the Government more than $1,400, that the marine had no proof of ownership or authority to sell these articles, that articles of this kind were in extremely short supply and had been largely preempted by the armed forces, and that petitioner had admitted that he suspected the articles were stolen because of these facts. In this setting, the fact which the jury was first required to find as a predicate for the inference of guilty knowledge—that petitioner sought to purchase the articles at a price disproportionate to their value—logically and persuasively tended to prove that he knew the goods were stolen. If nothing else, the knowledge common at the time, particularly to persons in trade, that articles such as watches and pens were extremely scarce in the civilian markets, must have made petitioner aware that quantities of such items offered at less than their wholesale value were stolen.

For the same reasons, it is apparent that the decision in *Bollenbach* v. *United States,* 326 U. S.

607, upon which petitioner relies (Pet. 29–33), is not apposite. That case involved an instruction as to a presumption—as distinguished from a permissible inference—which this Court held offended reason because it was not predicated on a fair summary of experience. 326 U. S. at 611. Moreover, as this Court noted in the *Bollenbach* case, the instruction there in question was not given the jury until it requested further enlightenment after seven hours of deliberation which had resulted in a hopeless deadlock, so that it may well have been the decisive factor leading to the verdict returned five minutes thereafter. Here, however, no such circumstances existed and the verdict patently turned on a collocation of facts which laid a rational foundation for the inference of guilty knowledge.

2. Petitioner also contends (Pet. 35–41) that Section 36 of the Criminal Code (*supra,* p. 2), under which he was indicted, does not apply to property of the character here involved; he argues that "the statute applies only to property that is or is to be part of the equipment of the military or naval forces and used by such forces in the performance of their duties and which is to remain the property of the United States. The statute does not apply to property of the United States which when issued or distributed ceases to be property of the United States." (Pet. 37.) This contention is negated by the plain language of the statute, which covers "any ordnance, arms,

ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service." The statute covers property of the United States of any character "furnished or to be used for the military or naval service."[2] Certainly, the watches and pens here involved were to be so furnished or used. The watches, manufactured to meet special service specifications, were acquired for issuance to Marine Corps personnel overseas when needed by them by reason of their particular service assignments and for sale only to officers going overseas. While fountain pens might arguably be less of a military necessity, nevertheless the evidence showed they were intended for sale only to military personel overseas and thus were, within the literal language of the statute, "to be used for the military or naval service."

Petitioner's interpretation of the statute as not covering property intended for the personal use of military personnel and to which the Government might not retain title, would appear to be foreclosed by the recent decision of this Court in *Northern Pacific Railway Co.* v. *United States,* No. 400, O. T. 1946, decided March 3, 1947. In that case, in construing and applying a section of

[2] Compare Section 35 (B) of the Criminal Code (18 U. S. C. 86) punishing the purchase or receiving in pledge of military property, which by its terms applies only to property "furnished by the United States" to military personnel.

the Transportation Act of 1940 providing that "military or naval property of the United States moving for military or naval and not for civilian use" is to be given land grant rates, this Court said (slip opinion, pp. 5–6):

> Military or naval property may move for civil use, as where army or navy surplus supplies are shipped for sale to the public. But in general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. * * *
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> * * * * *
>
> * * * The bowling alleys were also well within the statutory classification. The needs of the armed forces plainly include recreational facilities. The morale and physical condition of combat forces are as import-

ant to the successful prosecution of a war as their equipment. * * *

3. Petitioner's final contention is that there was insufficient evidence to establish that he knew that the articles in question were furnished or to be used for the military or naval services or that they were stolen from the United States (Pet. 41–43). He did not, however, challenge the sufficiency of the evidence in the trial court.[3] In any event, the circumstances of the purchases discussed in the Statement, including petitioner's own admissions (see pp. 5–6, *supra*), clearly show that he had the requisite knowledge. (See also Point 1, *supra*, pp. 6–8.)

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

APRIL 1947.

[3] Counsel for Amdursky moved for a directed verdict (R. 119), but no such motion on behalf of petitioner is shown by the record.

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